

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GABRIELA RESENDEZ,

Plaintiff,

v.

SMITH'S FOOD & DRUG CENTERS,
INC.; THE KROGER CO.
FOUNDATION; DOE EMPLOYEE;
DOES II through V and ROE
CORPORATIONS VI through X,
inclusive,

Defendants.

Case No. 2:14-cv-00201-APG-NJK

**ORDER GRANTING PLAINTIFF'S
MOTION TO AMEND AND
REMANDING CASE TO STATE
COURT**

(Dkt. Nos. 7, 17)

Plaintiff Gabriela Resendez filed a Motion to Remand (Dkt. No. 7) and a Motion to Amend/Correct Complaint. (Dkt. No. 17). For the reasons set forth below, the Court grants both motions.

I. Procedural Posture

This case arises from an alleged slip and fall accident that took place in July 2012 at a Smith's grocery store in Las Vegas, Nevada. Plaintiff filed her Complaint in Clark County District Court on January 13, 2014. [Dkt. No. 1-1.] In her Complaint, she named as Defendants Smith's Food & Drug Centers, Inc. ("Smith's"); The Kroger Co. Foundation;¹ Doe Employee; Does II through V; and Roe Corporations VI through X. [Dkt. No. 1.] Plaintiff alleged negligence; negligent hiring, training, supervision and retention; and respondeat superior. [Dkt. No. 1-1.]

On February 6, 2014, Defendant Smith's Food & Drug Centers, Inc. ("Smith's") removed this case to federal court based on diversity. [Dkt. No. 1.] Smith's is an Ohio corporation with its principal place of business in Utah, and Plaintiff is a Nevada resident. On February 21, 2014,

¹ Plaintiff agreed to dismiss Defendant The Kroger Co. Foundation. [Dkt. No. 1.]

1 Plaintiff filed a Motion to Remand, arguing, among other things, that her naming of fictitious
 2 defendants destroyed diversity. [Dkt. No. 7.] Plaintiff is incorrect, as “doe” parties are ignored
 3 when analyzing diversity jurisdiction.

4 As a result of Smith’s Initial Disclosures, Plaintiff learned from Smith’s Supplemental
 5 Floor Inspection Statement that Ryan Overby was the employee responsible for inspecting and
 6 maintaining the area of the store where Plaintiff allegedly fell. [Dkt. No. 17 at p. 10.] Plaintiff’s
 7 motion to amend her Complaint seeks to substitute Overby for “Doe Employee.” [Dkt. No. 17.]
 8 The Supplemental Floor Inspection Statement indicates that Overby is a Nevada resident. [*Id.*]
 9 Plaintiff received the Supplemental Floor Inspection Statement 11 days before filing the instant
 10 motion to amend. [Dkt. No. 17.]

11 **II. Leave to Amend**

12 Courts should freely grant leave to amend when “justice so requires.”² In so determining,
 13 courts consider: “(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of
 14 amendment, and (5) whether plaintiff has previously amended his complaint.”³ “Rule 15’s policy
 15 of favoring amendments to pleadings should be applied with extreme liberality.”⁴

16 None of these factors precludes this Court from granting Plaintiff leave to amend her
 17 original Complaint. Plaintiff has not previously amended her original Complaint. Plaintiff only
 18 recently learned Doe Employee’s name, and the original Complaint made clear she sought to
 19 identify him. Thus, leave to amend is clearly warranted.

20 **III. Lack of Subject Matter Jurisdiction**

21 Although Plaintiff’s motion to remand may not have been meritorious at the time it was
 22 filed, the subsequent addition of defendant Overby to this case destroys diversity. Federal courts
 23

24 ² Fed. R. Civ. P. 15(a)(2).
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26 ³ *Sisseton–Wahpeton Sioux Tribe of Lake Traverse Indian Reservation, North Dakota and South Dakota v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).

27 ⁴ *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (internal quotation marks omitted).
 28

1 have a duty to examine their subject matter jurisdiction whether or not the parties raise the issue.⁵
 2 “The ‘strong presumption’ against removal jurisdiction means that the defendant always has the
 3 burden of establishing that removal is proper.”⁶ “If at any time before final judgment it appears
 4 that the district court lacks subject matter jurisdiction, the case shall be remanded.”⁷

5 Federal courts have jurisdiction over disputes between citizens of different states pursuant
 6 to 28 U.S.C. § 1332. However, complete diversity of the parties is required.⁸ Because Overby is
 7 apparently a Nevada resident, his substitution destroys diversity, and this Court no longer has
 8 subject matter jurisdiction over this action.

9 **IT IS THEREFORE ORDERED** that Plaintiff’s Motion to Amend/Correct Complaint
 10 [Dkt. No. 17] is GRANTED. Plaintiff is granted leave to amend her Complaint to substitute Ryan
 11 Overby for Defendant DOE EMPLOYEE.

12 **IT IS FURTHER ORDERED** that Plaintiff’s Motion to Remand [Dkt. No. 7] is
 13 GRANTED. This case is REMANDED to the Eighth Judicial District Court, Clark County,
 14 Nevada.

15 DATED THIS 4th day of April, 2014.



16
17
18 ANDREW P. GORDON
19 UNITED STATES DISTRICT JUDGE
20

21 ⁵ See *United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 360 F.3d 960, 966 (9th Cir. 2004) (citing
 22 *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)) (“[A] district court’s duty to establish subject matter
 23 jurisdiction is not contingent upon the parties’ arguments.”); *Attorneys Trust v. Videotape Computer
 Products, Inc.*, 93 F.3d 593, 594–95 (9th Cir. 1996) (lack of subject matter jurisdiction may be raised at
 any time by the court *sua sponte*).

24 ⁶ *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

25 ⁷ 28 U.S.C. § 1447(c); see also *Kelton Arms Condominium Owners Ass’n v. Homestead Ins. Co.*, 346 F.3d
 26 1190, 1192 (9th Cir. 2003) (citing *Sparta Surgical Corp. v. Nat’l Ass’n Sec. Dealers, Inc.*, 159 F.3d 1209,
 1211 (9th Cir. 1998)) (“[A] district court must remand if it lacks jurisdiction.”).

27 ⁸ 28 U.S.C. § 1332(a) (diversity jurisdiction “applies only to cases in which the citizenship of each plaintiff
 28 is diverse from the citizenship of each defendant.”); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996).